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80-1652
No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

In the Matter of the Arbitration

—between—

INTERNATIONAL PRODUCE, INC.,*

Petitioner,

—and—

A/S ROSSHAVET, Owners of the S.S. ROSS ISLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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*International Produce Inc. is a wholly owned subsidiary of Bunge Corporation, a privately held corporate entity.

Questions Presented

A serious conflict exists between the decision of the United States Court of Appeals for the Second Circuit and the decision of this Court in *Commonwealth Coatings Corp.* v. *Continental Casualty Corp.*, 393 U.S. 145 (1968) with respect to the intent of Congress when, under the United States Arbitration Act, 9 U.S.C. §§1-14, Congress authorized vacation of an arbitration award "* * * when there was evident partiality * * *" (9 U.S.C. 10(b)). This Court, in *Commonwealth Coatings,* held that it was the intention of Congress, in condoning settlement of disputes through arbitration "to provide not merely for any arbitration but for an impartial one" (p. 147). This Court further held an "appearance of bias" satisfied the standard intended by Congress for the setting aside of arbitration awards and equated "appearance of bias" with "evident partiality" (p. 150).

In its decision of January 8, 1981, the Court of Appeals in effect abdicated its judicial responsibility to insure that arbitrations are not only impartial, but that the panel members avoid the appearance of being partial when it refused to accept the interpretation placed on §10(b) of 9 U.S.C. by this Court and reversed the District Court which had correctly interpreted the law and the facts on the authority and guidelines set down by this Court.*

Further, the Court of Appeals was in error when it refused to recognize a party's absolute right to reject an arbitrator after disclosure of a relationship that might create the impression of possible bias, under the guise that a contrary view would disrupt the process of settling maritime disputes through arbitration.

Thus, the basic question in this case is:

> Whether Congress intended that under the United States Arbitration Act parties who submit controversies to ar-

*The United States Court of Appeals for the Seventh Circuit is in conflict with the Second Circuit by recognizing the appearance of bias standard. *United States Wrestling Federation* v. *Wrestling Division of the AAU, Inc.*, 605 F.2d 313,317 (7th Cir., 1979).

bitration panels authorized by law to make non-appealable determinations are entitled to have arbitrators who could not reasonably be thought biased against one party and favorable to the other or in any way appear to be biased?

A subsidiary question is:

Whether a party to an arbitration has an absolute right to reject an arbitrator after there is a disclosure of a relationship that might create the impression of possible bias.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, International Produce Inc. (International), prays that a writ of certiorari issue to review the judgment entered in this case on January 8, 1981, by the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals which reversed and remanded the opinion of Judge Vincent L. Broderick of the United States District Court for the Southern District of New York, is not yet reported officially. A copy is reproduced in a separately bound appendix to this petition (App. 1a-10a)[1]. For ready reference the opinion of Judge Broderick holding in favor of petitioner, International, is reproduced in the separately bound appendix to this petition (App. 11a-19a)[2]. Also reproduced in the appendix to this petition is the decision and award of the arbitration panel (App. 24a-45a).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 8, 1981. This petition is being filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

Statute Involved

The relevant statute, which is reproduced in the separately bound appendix (App. 46a), is §10(b) of the United States Arbitration Act of 1925, 9 U.S.C. 1-14 (1976).

Statement of the Case

This case comes to this Court following the reversal by the Court of Appeals for the Second Circuit of an order of Judge Vincent L. Broderick rendered on April 16, 1980, wherein Petitioner's application to vacate an arbitration award was granted pursuant to 9 U.S.C. §10(b) (1976) on the grounds that the Chairman of the arbitration panel refused to withdraw from the panel after having been challenged for cause. (App. 11a-19a).

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[1]References are to pages of the separately bound appendix.

[2]Unofficially reported, *In the matter of arbitration between International Produce, Inc. and A/S Rosshavet,* 1980 AMC 2316 (S.D.N.Y.).

Based on the circumstances of conflict which developed during the course of the arbitration proceedings the District Court found a clear "appearance of bias" arose within the "evident partiality" provision of 9 U.S.C. §10(b) (1976).

Applying the teachings of *Commonwealth Coatings Corp.* v. *Continental Casualty Corp.* 393 U.S. 145 (1968) (hereinafter *Commonwealth Coatings*), the District Court held that where a disclosure gives rise to a well-founded objection by a party to an arbitrator's continuation as a member of the panel, the arbitrator must disqualify himself. (App. 15a)

The Court of Appeals for the Second Circuit reversed and remanded with direction to confirm the arbitration award. (App. 1a-10a)

Statement of the Facts

In March 1974, International, petitioner herein, entered into a charter party agreement with A/S Rosshavet (Rosshavet), for the hire of A/S Rosshavet's vessel, the S.S. ROSS ISLE. As a result of certain events which took place subsequent to the vessel's loading at Destrehan, Louisiana, in late March 1974, disputes arose between the parties. Invoking the arbitration clause in the charter party, International demanded arbitration and appointed Edward Schilling as arbitrator; Rosshavet appointed Lloyd C. Nelson. Mr. Schilling passed away and in his place International appointed Mack G. Klosty. Thereafter, the two arbitrators selected H. L. Cederholm as Chairman. Mr. Cederholm was, at the time of his selection as Chairman, at the time he was challenged, and still is, a Vice President of James W. Elwell & Co. Inc. and his duties concern managing the operations and chartering activities for the Elwell firm, which deals in the management of various vessels and the ownership of others.

The first arbitration hearing took place on September 9, 1977 during which opening statements were made by counsel but no witnesses were called. The next hearing took place on December 6, 1977, when Rosshavet produced two witnesses. Due to illness, one of the panel members, Mr. Nelson, could not be present; however, counsel for Rosshavet obtained the agreement of International's counsel to proceed with the understanding that the transcript would be made available to Nelson for reading at a later date. The next hearing was scheduled for January 17, 1978.

In mid-December 1977, Hill, Rivkins[3] was retained by one of its traditional clients to represent their interests in a substantial case involving a vessel called the MARY S. This vessel's interests were managed by Mr. Cederholm's firm, James W. Elwell & Co. Inc., and indeed the problem which gave rise to the claim in the MARY S. matter was one in which Mr. Cederholm

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[3]Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, counsel for Petitioner, International.

was intimately and personally involved.[4] The defense of the owner's interest in the MARY S. matter at the time of the happening of the events which gave rise to the MARY S. dispute was referred by Mr. Cederholm, Elwell, the vessel's owner and/or their Protection and Indemnity Club to the firm of Haight, Gardner, Poor & Havens (Haight), *the same firm representing Rosshavet in the present case*. Additionally, it developed that Howard S. Miller, an associate in the Haight firm, was assisting both John C. Moore in the present case, and Thomas R. H. Howarth, the Haight partner who was dealing with the MARY S. case; and Messrs. Howarth and Miller had been advising Cederholm long prior to Hill, Rivkins' retention in that case.

When these circumstances came to the attention of J. Edwin Carey, the Hill, Rivkins partner who was representing International in the present case, and in view of the obvious conflict of interest with which Mr. Cederholm appeared to be faced, the matter was brought to the attention of International which gave instructions to challenge Mr. Cederholm and request that he withdraw as chairman of the panel in the ROSS ISLE matter.

On January 3, 1978, Carey telephoned Cederholm and related the various facts and circumstances of conflict, emphasizing the further fact that he (Cederholm) was personally concerned with the MARY S. case and would, in all likelihood, be called upon to give testimony in that case. He was informed that there was a serious conflict of interest on his part which gave rise to a presumption or appearance of bias and it was requested that he withdraw as Chairman of the ROSS ISLE Panel.

There followed a rash of correspondence, which began with Mr. Cederholm's letter of January 5, 1978, wherein he brought the matter of his "interrelationship" and International's demand that he withdraw to the attention of Mr. Moore of the Haight firm and the other members of the Panel and sought their com-

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[4]Judge Broderick found as a fact that Cederholm "* * * was personally involved in the negotiations and activities of December 8 and 9, which led to the disputes between the owner of the MARY S and its charterer. * * *" (App. 15a, footnote 1).

ments. Mr. Moore (Rosshavet's counsel) reacted with a letter of January 6, 1978, urging Cederholm not to withdraw. Mr. Carey (International's attorney) wrote on January 9, 1978, insisting that Cederholm step down, and Messrs. Klosty and Nelson (the other members of the panel), on January 12, 1978, wrote requesting Cederholm to remain.

On January 13, 1978, Mr. Cederholm wrote to Mr. Carey and stated, *inter alia,* "I respectfully decline to withdraw". He conditioned his decision to continue as chairman of the panel on the premise "that Mr. Howard Miller divorces himself from either the Ross Isle case or the Mary S. matter."

A further hearing was held on June 6, 1978, and subsequently an Award was rendered on July 1, 1979. (App. 24a-45a)

It is submitted that the Panel Chairman in the setting which prevailed in late December 1977 was in an irreconcilable position of conflict which gave rise to a presumption of bias on the basis of which he should have withdrawn. It is further submitted that this appearance of bias operated as an absolute impediment to his continuation as a member of the Panel and rendered further proceedings in the arbitration a nullity.

Cederholm's Impediments to Impartiality

In deciding not to withdraw from the Panel, Cederholm violated a most sacred tenet of one charged with the responsibility of adjudicating disputes between parties; he found himself in a position of non-neutrality where his impartiality had been challenged and was suspect.

It would be difficult to imagine where one could encounter a more substantial example of an appearance of bias or potential for bias than that which existed in the instant case. The fact pattern encountered includes the following ingredients:

> (1) Mr. Cederholm, sitting as Chairman of the ROSS ISLE Panel, was the Vice President of the Elwell firm which managed the MARY S for her owner;

(2) Mr. Cederholm was personally and intimately involved in making the decisions which precipitated the MARY S dispute;

(3) Hill, Rivkins was called upon to attack Cederholm's decisions and his credibility when representing the interests of the charterer of the MARY S;

(4) Mr. Cederholm retained the Haight firm, which actively advised him during the early stages of the MARY S. problem and actively participated in the MARY S arbitration as attorneys for the owner during the period when he was *sitting as chairman of a panel* in which Haight and Hill, Rivkins represented other adversary clients;

(5) Mr. Miller, an associate of the Haight firm, assisted in both cases until removed at the direction of Mr. Cederholm as a condition of Cederholm's continuing as chairman of the ROSS ISLE panel;

(6) Mr. Cederholm, during the pendency of the ROSS ISLE arbitration, regularly consulted with Haight on matters having to do with the MARY S defense;

(7) Mr. Cederholm gave more than 80 pages of testimony in the MARY S arbitration proceedings wherein he was represented by Haight and cross-examined by a Hill, Rivkins' partner;

(8) Mr. Cederholm would have a continuing and intimate relationship with the Haight firm, their members and associates, in preparing the defense of the MARY S case and preparing himself for the testimony he gave in that case;

(9) Mr. Cederholm instructed Haight to remove Mr. Miller, the common associate, from one case or the other;

(10) The MARY S arbitration was pending during the entire period of time when the ROSS ISLE panel, with Mr. Mr. Cederholm as Chairman, was continuing its hearings;

(11) After having made the decision not to retire from the panel, Mr. Cederholm recognized that neither Inter-National nor Hill, Rivkins consented to the "propriety" of his remaining, whereupon he proposed that Hill, Rivkins divest itself of the representation of its client in the MARY

S case. (With such a proposal, Mr. Cederholm, at the very least, gave the appearance of using his position as a neutral Chairman in one arbitration to weaken his opposition in another arbitration.)

Cederholm sought to maintain Chairmanship of the ROSS ISLE panel where Hill, Rivkins was representing International on the one hand and place himself, his credibility and decision making in the MARY S in an adversarial position with respect to Hill, Rivkins on the other. During the same time period Cederholm was represented by, and had an attorney/client relationship with the Haight firm in the MARY S case, which same firm represented Rosshavet in the ROSS ISLE case, which Cederholm had before him for decision.

Judge Broderick properly concluded that these relationships were more than trivial (App. 18a) and violated the standard set by this Court in *Commonwealth Coatings*.

The Proceedings Below

A. The Decision of the District Court

Consistent with the guidelines of *Commonwealth Coatings,* Judge Broderick found that the law as applied to the facts of this case required that the Award be vacated. (App. 16a; 18a). He refused to follow Rosshavet's argument that vacation of the Award was dependent upon a strict interpretation of "evident partiality" and accepted this Court's view as stated in *Commonwealth Coatings,* citing *Sanko S.S. Co.* v. *Cook Industries Inc.,* 495 F. 2d 1260 (2nd Cir., 1973) and *Overseas Private Investment Corp.* v. *Anaconda Co.,* 418 F. Supp. 107 (D. Colo. 1976), holding:

> "* * * In order for arbitration to remain effective, arbitrators must not only be honest but also above suspicion." (App. 15a)

The opinion of the District Court further stated:

> "Disclosure alone does not discharge the arbitrator's responsibility. If the disclosure gives rise to a well-founded objection, the arbitrator must disqualify himself. 'The point is, obviously, that disclosure is necessary to afford grounds and opportunity for objection.' *Miserocchi* v. *Peavey International Inc.,* 78 Civ. 1571 (S.D.N.Y., Sept. 15, 1978) (Frankel, J.)". (App. 15a, 16a)[5]

On the evidence presented, Judge Broderick properly held that (1) the totality of the Cederholm relationship to both law firms representing the parties in the ROSS ISLE case created an appearance of bias; (2) there was not only a potential for bias in favor of Rosshavet but also a potential for bias against

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[5]Judges Broderick and Frankel recognize the subtlety of Justices White and Marshall concurring with Justice Black in *Commonwealth Coatings,* 393 U.S. at 151 when they observe that rejection of the arbitrator is best consigned to the parties following an objectionable disclosure, when replacement is easy and of little cost.

International; (3) the potential for bias was aggravated by Cederholm's active involvement in the MARY S case, his continuing consultation with Rosshavet's counsel (Haight) in his and his employer's interest and his cross-examination by Hill, Rivkins (International's counsel) giving rise to an adversarial relationship which could be expected to be transferred to Hill, Rivkins' client. It was evident to Judge Broderick (as it should have been clear to the Court of Appeals had Judge Lumbard not misconceived the applicable law) that Cederholm's inter-relationships, to which International objected in early January, 1978, were substantial indeed and the great number of conflicts affecting the Panel Chairman were of such a partisan nature and of such substantial proportions that he should have disqualified himself when requested to do so.

The District Court recognized the "policy of insulating arbitration proceedings" but refused to abdicate its judicial responsibility of insuring that parties to an arbitration proceeding have the opportunity of having their disputes adjudicated by a tribunal which appeared to be impartial. (App. 18a)

B. The Decision of the Court of Appeals

The Court of Appeals reversed and remanded the case with instructions to confirm the arbitration award. (App. 10a). It did so because it misinterpreted and misapplied the 1968 decicision of this Court in *Commonwealth Coatings,* in which the majority of this Court gave effect to the intention of Congress insofar as it related to 9 U.S.C. §10(b) (1976). The Court of Appeals said that Judge Broderick was wrong to equate "an appearance of bias" with the statutory language "evident partiality" (App. 6a, 7a)—yet, that is exactly what Justice Black stated was the law.

Further, the Court of Appeals reasoned that the concurring opinions of Justices White and Marshall restricted the scope of the ruling "to situations where business and financial dealings with a party are not disclosed" (App. 7a); and that the concurring Justices disassociated themselves from Justice Black's ruling

when he wrote for the Court in respect of "appearance of bias". (App. 7a) The concurring Justices did no such thing! Indeed, they expanded on Justice Black's opinion, confirming that to do otherwise would be "an abdication of our responsibility", *Commonwealth Coatings,* 393 U.S. at 150. Finally, Justices White and Marshall, with respect to disclosure and a party's right of challenge, confirmed it is preferable that a disqualifying relationship be disclosed, "* * * when the parties are free to reject the arbitrator * * *. The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, * * *". *Commonwealth Coatings,* 393 U.S. at 151.

It is clear that the Court of Appeals erred in its interpretation of the majority and concurring opinions of the Justices of this Court and by so doing expose arbitral litigants to highly hazardous situations of partiality and bias in any case other than ones where an arbitrator has had direct financial dealings with one of the parties. This was not the intention of Congress when it enacted the United States Arbitration Act as so aptly stated by this Court.

But consider that portion of the opinion of the Court of Appeals which cuts to the heart of the issue. Judge Lumbard wrote:

> "* * * a decision on our part to vacate arbitration awards *whenever a mere appearance of bias can be made out* would seriously disrupt the salutary process of settling maritime disputes through arbitration. * * *" (emphasis supplied) (App. 9a)

Thus, in the interest of avoiding what Judge Lumbard considered to be the possibility of disrupting the maritime arbitration process (which could not be the case in any event), the Court of Appeals abdicated its responsibility to insure that parties to arbitration proceedings, at all cost, appear before a completely unbiased and impartial tribunal, none of whom could even be considered to appear to be biased. In contrast, Judge Broderick recognized this subtlety and followed the direction of this Court in its annunciation of the rule. (App. 15a).

It is for these reasons that the petitioner asks this Court to invoke its reviewing authority in this case to remove the legal conflict by issuing a further definitive determination concerning the Congressional intent that parties are not only entitled to resolve their disputes through any arbitration, but that the arbitrators appear to be impartial.

Reasons for Granting the Writ

1. A conflict exists between the Supreme Court of the United States and the United States Court of Appeals for the Second Circuit Concerning Congressional Intent.

This case presents a threshold question of Federal law involving Congressional intent in respect of which this Court has heretofore ruled. The principal legal error committed by the Court of Appeals for the Second Circuit lies in its failure to find that the standard of "evident partiality" of 9 U.S.C. 10(b) (1976) includes the "appearance of bias" standard announced by this Court in *Commonwealth Coatings*. In its enthusiasm to avoid disrupting maritime arbitration, the Court of Appeals has virtually given carte blanche to arbitrators to remain on tribunals, elements of conflict of interest, bias and partiality notwithstanding. In such a setting, an aggrieved party who has a justifiable objection to a panel member is pre-empted and, apparently in the Second Circuit's view, may not reject an arbitrator unless there is a direct financial relationship between the arbitrator and a party. It is submitted that Congress never intended such a result. Indeed, this Court has held that there must be complete impartiality and freedom from bias among the members of the panel of arbitrators.

Significantly, this Court began its opinion in *Commonwealth Coatings*, 393 U.S. at 145 by stating:

> "At issue in this case is the question whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration."

The Court emphatically held that such "elementary requirements" were not suspended and rejected the narrow construction placed on Section 10(b) of the Act by the lower courts and the dissent in that case. The Court held at p. 147:

"* * * These provisions show a desire of Congress to provide not merely for *any* arbitration but for an impartial one.* * *" (emphasis supplied)

Justice Black, writing for the majority of the Court, held that

a) §10(b) authorizes vacation of an award "* * * where there was 'evident partiality' * * *" and that the language of the statute shows a desire of Congress "* * * to provide not merely for any arbitration but for an impartial one * * *" (p. 147);

b) it is not appropriate for the Court to "* * * allow this manifest violation of the strict morality and fairness Congress would have expected on the part of the arbitrator and the other party in this case.* * *" (p. 148); and

c) "* * * we should be more scrupulous to safeguard the impartiality of arbitrators than judges since the former have completely free rein to decide the law as well as the facts and are not subject to review.* * *" (p. 149).

Comparing §18 of the American Arbitration Rules and the 33rd Canon of Judicial Ethics, this Court concluded:

"* * * that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that 'might reasonably' be thought biased against one litigant and favorable to another." (p. 150)

It was Justice White with whom Justice Marshall joined in a concurring opinion who made it clear that the role of rejection of an arbitrator is "best consigned to the parties", but that it would be "abdication of our responsibility" to give effect to an award where a member of the Panel was something less than completely impartial and unbiased.

Justice White's remarks were directed at (i) the inherent difference between an arbitrator and a judge and (ii) the need of full disclosure. Nowhere did he disassociate himself from the main thrust of the Court's opinion that a party is entitled to a fair hearing before a tribunal that "not only must be unbiased but also must avoid the appearance of bias." *Commonwealth Coatings,* 399 U.S. at 150.

We suggest that it was error on the part of the Court of Appeals to state that Justices White and Marshall "disassociated themselves from Justice Black" (App. 7a) in respect of that portion of the Court's opinion which equates "appearance of bias" with "evident partiality." Indeed Justice White stated at the outset of his opinion "* * * I am glad to join my Brother Black's opinion in this case,* * *". (p. 150)

2. Since *Commonwealth Coatings,* the Rule of "Appearance of Bias" Has Been Accepted Law.

Not only is the proper test in these impartiality/bias cases an objective one, but the types of facts which fall within the purview of the "evident partiality" language of Section 10(b) of 9 U.S.C. are myriad. Many of the cases which have considered the "evident partiality" language have dealt with the issues of disclosure and pecuniary interest. Although the Act does not specifically provide that there must be disclosure, it has been held that an arbitrator's failure to disclose requires that an arbitration award be vacated. Courts in other cases have also applied the principle to the facts; sometimes vacating, sometimes not, but always applying the "appearance of bias" principle.

In *Sanko S.S. Co. Ltd.* v. *Cook Industries,* 495 F. 2d 1260 (2nd Cir., 1973), the Court of Appeals for the Second Circuit remanded the case to the District Court for an evidentiary hearing to determine the extent of the arbitrator's involvement with one of the attorneys and, secondly, to determine the extent of the arbitrator's involvement with one of the parties. Presumably, if these relationships were significant, then the award would have to be vacated.

In *Overseas Private Investment Corp.* v. *The Anaconda Company,* 418 F. Supp. 107 (D.C. Col. 1976), one of the arbitrators (Sommers) had sought employment with a law firm (Curtis) who had assisted the trial counsel for Anaconda by obtaining an affidavit. The Court held that this relationship did not compel vacating the Award. However, "* * * if Curtis was Anaconda's counsel, the numerous meetings with Mr. Sommers would no doubt create the appearance of bias * * *." *Overseas Private Investment Corp.* v. *The Anaconda Company,* 418 F. Supp. at 111.

In *Miserocchi & Co. Spa* v. *Peavey International Inc.,* 78 Civ. 1571, (S.D.N.Y., Sept. 15, 1978) and in *Commonwealth Coatings,* a financial relationship between an arbitrator and a party required the Award to be vacated.

In other cases where there has been a failure to prove a significant relationship, the Awards have been upheld. However, no Court has rejected the *Commonwealth Coatings* holding that it was the intent of the Congress that "evident partiality" includes an "appearance of bias."

Moreover, as stated in *Andros Compania Maritima* v. *Marc Rich & Co.,* 579 F. 2d 691, 700 (2nd Cir., 1978):

> "These decisions demonstrate that we have viewed the teachings of *Commonwealth Coatings* pragmatically, employing a case-by-case approach in preference to dogmatic rigidity."

It was error for the Court of Appeals to disassociate itself from the rule established by this Court in respect of "evident partiality" and "appearance of bias."

3. The Parties' Congressional Guarantee That Their Disputes Be Adjudicated by an Impartial Tribunal is Paramount.

If the intent of Congress was, as this Court has stated, that §10(b) of 9 U.S.C. operates as a protective instrument to parties

so that they may be assured of arbitrating their disputes before not only unbiased tribunals, but panels made up of members who avoid even the "appearance of bias"; then surely the Court of Appeals must have been in error when it expressed concern that a decision on its part to vacate arbitration awards whenever there was an appearance of bias would disrupt the process of settling disputes through arbitration.[6]

A reaffirmation of the principles of fair dealings and impartial tribunals can only strengthen the arbitration process. The Court of Appeals for the Second Circuit noted in *Sanko S.S. Co. Ltd.* v. *Cook Industries Inc.*, 495 F.2d 1260 (2nd Cir., 1973) that arbitrations offer parties the ability to shape their own proceedings. The procedures for compelling arbitrators to step down are essential accoutrements which permit parties to be the architects of their own arbitrations. In that case the Court wrote:

> "Moreover, the role of the judiciary in determining an arbitrator's impartiality after an award has been made will be significantly reduced since the parties will have the opportunity at the outset of the arbitration *to reject or accept him with full knowledge of his connection with the other party.*" (footnotes omitted) *Sanko S.S. Co., Ltd.* v. *Cook Industries,* 495 F. 2d at 1264." (emphasis supplied)

It is, therefore, of the most urgent importance that this Court reaffirm a party's absolute right to reject an arbitrator for cause. The Congressional intent that those authorized by law to adjudicate disputes between parties be totally impartial and free from even an "appearance of bias" for or against one or either of the parties to the dispute is recognition of such a right.

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[6]See *Sanko S.S. Co.* v. *Cook Industries Inc., supra,* where the same Court expressed no such concern.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
March 31, 1981

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Decision and Order of the United States Court of Appeals, Dated January 8, 1981

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 132—September Term, 1980
(Argued October 15, 1980 Decided January 8, 1981)
Docket No. 80-7387

INTERNATIONAL PRODUCE, INC.,

Petitioner and
Cross-Respondent-Appellee,

—against—

A/S ROSSHAVET,
Owners of the S.S. ROSS ISLE,

Respondent and
Cross-Petitioner-Appellant.

Before:

LUMBARD, MANSFIELD and MESKILL,

Circuit Judges.

Appeal from an order of the Southern District of New York, Broderick, *J.*, which vacated an arbitration award and denied appellant's petition to confirm it. Reversed and remanded with instructions to confirm the award.

JOHN C. MOORE, ESQ., New York, N.Y. (Haight, Gardner, Poor & Havens, New York, N.Y., Mark C. Flavin, Esq., of counsel), *for Appellant, A/S Rosshavet.*

PATRICK V. MARTIN, ESQ., New York, N.Y. (Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, New York, N.Y., J. Edwin Carey, Esq., Anthony J. Mavronicolas, Esq., of counsel), *for Appellee, International Produce.*

LUMBARD, *Circuit Judge*:

A/S Rosshavet appeals from an order of the Southern District of New York vacating an arbitration award. A unanimous three-member arbitration panel awarded Rosshavet $1.2 million as damages arising from a ship's charter agreement. The opposing party, International Produce, Inc., petitioned the district court under 9 U.S.C. §10 (1976) for an order vacating that award on the ground that one of the arbitrators, Hammond L. Cederholm, should have recused himself because of his role in an unrelated arbitration. Rosshavet cross-petitioned for an order confirming the award. The district court granted International's petition to vacate the award, finding that the arbitrator's appearance of bias toward one of the law firms in the arbitration violated 9 U.S.C. §10(b).[1] We reverse that order and remand with direction to confirm the award.

At the time of the incident leading to the challenged arbitration, Rosshavet owned a vessel named the S.S. Ross Isle. International chartered it through a charter party dated March 7, 1974. At International's direction, the Ross Isle was loaded with corn and soybeans at Destrehan, Louisiana on March 22, 1974 and proceeded downriver on the evening of March 24. Seven and one-half hours later, on March 25, the vessel ran aground in the Southwest Pass of the Mississippi River. Invoking the arbitration clause of the charter party, each party asserted claims

[1]The district court at first entered judgment on April 30, 1980, which denied the petition to vacate and granted the petition to confirm. The district court corrected that judgment by an order of May 7 to reflect the memorandum opinion accurately.

against the other arising from the grounding and the related delay.

As provided in the arbitration clause, Rosshavet and International each appointed an arbitrator, and the two arbitrators then appointed a third. Rosshavet appointed Lloyd C. Nelson; International appointed Mack G. Klosty; and Nelson and Klosty then selected Hammond L. Cederholm to act as the third arbitrator and chairman. Cederholm is, and was at the time of his selection, a Vice-President of James W. Elwell & Co., Inc. (Elwell), a management firm retained by owners of various commercial vessels.

At the initial September 8, 1977 hearing, each of the arbitrators disclosed possible conflicts of interest. Nelson, Rosshavet's appointee, stated that his firm had a long-standing business relationship with International's parent corporation. Klosty, International's appointee, disclosed that he had previously been appointed as an arbitrator by International and that he had done business with them as a broker. Rosshavet's counsel, Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy (Hill Rivkins), accepted Nelson's and Klosty's participation. Cederholm stated that, although he had no dealing with Rosshavet or International, Haight, Gardner, Poor & Havens (Haight Gardner)—who was representing International—was also handling a Protection and Indemnity Club matter (the Mary S. Arbitration #1) for one of Elwell's clients. Cederholm then invited questions from both counsel. International's counsel, J. Edwin Carey, of Hill Rivkins, stated that he had no questions and that the panel was acceptable to International. He did not ask Cederholm the name of the vessel involved in Haight Gardner's representation; if he had, he would have learned that it was the Mary S.

One of Elwell's clients, World Carrier Corporation, owned the Mary S. Neither Cederholm nor Elwell had any financial interest in World Carrier, and Elwell received a fixed fee regardless of the Mary's S.'s profitability. The Mary S. was protected by a

Freight, Defense and Demurrage policy of the Protection and Indemnity Club Assuranceforeningen Gard (Gard), a common type of maritime insurance that covers the legal expenses of any claims involving the vessel but not any ultimate liability on such claims. The law firm of Haight Gardner had represented the Gard in New York since 1936; and when the first arbitration hearing in the Ross Isle dispute was held, Haight Gardner was already representing World Carrier as owner of the Mary S. in an unrelated dispute, the Mary S. Arbitration #1. The dispute which led to the Mary S. Arbitration #2 had not yet arisen.

On December 6, 1977, Rosshavet presented its witnesses in the arbitration, which was held in New York: Captain Hjarand Sem, the Master of the Ross Isle, and Captain Walter Durabb, the Branch Pilot in control of the Ross Isle when it went aground. Sem had come from Norway for the hearing and Durabb from Louisiana. The previous afternoon, however, Arbitrator Nelson had become ill and was unable to attend the hearings. Because of the expense of bringing the witnesses to New York and the uncertainty of their future availability, the parties agreed to proceed with only two arbitrators on the understanding that the missing arbitrator would read the transcript.

Two days later, on December 8, 1977, the Mary S. became involved in a dispute related to the closing of the St. Lawrence Seaway. Cederholm, as an officer of the firm that managed the Mary S., was involved in the negotiations which preceded the impasse. The owners of the Mary S. again retained Haight Gardner as recommended by the Gard's New York representative; the charterers retained Hill Rivkins. Thus, the choice of law firms in the Mary S. Arbitration #2 left Cederholm in the position of being a non-party witness in a suit between parties who were represented by the same law firms that were appearing before him in the Ross Isle arbitration.

On January 5, 1978, Carey of Hill Rivkins telephoned Cederholm and suggested that he should resign from the Ross Isle

panel because a Haight Gardner attorney would "in all likelihood" call Cederholm and prepare him to testify in the Mary S. arbitration and a Hill Rivkins attorney would then cross-examine him. However, only one attorney—Howard Miller, an associate at Haight Gardner—was involved in both the Mary S. and the Ross Isle disputes. That same day, Cederholm wrote to his fellow arbitrators and to both counsel in the Ross Isle arbitration, informing them of the alleged conflict of interest and seeking their recommendations.

Rosshavet's counsel urged that Cederholm stay on the panel to avoid prejudicing their client: if Cederholm withdrew, there would be only one arbitrator who had observed Rosshavet's witnesses. Both of the other arbitrators strongly discouraged Cederholm's resignation, stressing Cederholm's personal integrity as well as the difficulty of finding any arbitrator in the relatively small maritime community without some possible speculative conflict. Carey, however, formally requested Cederholm's withdrawal, although he simultaneously expressed confidence that Cederholm could "continue to act judiciously and objectively without partiality or bias."

On January 13, 1978, Cederholm informed Carey that he was remaining on the panel because no aspect of the Mary S. Arbitration #2 threatened his impartiality in the Ross Isle arbitration: "they are entirely dissimilar cases and there are no inter-relationships between the principals of both cases." Cederholm did condition his decision on the removal of the one attorney working on both cases, Howard Miller of Haight Gardner, from one case or the other. Haight Gardner immediately removed Miller from the Mary S. case. Carey acknowledged Cederholm's decision and announced his intention to proceed with the introduction of evidence at the January 17 hearing.

Following the January 17 hearing, Cederholm wrote to Carey on January 26 and proposed that, since Carey had not conceded or acknowledged the propriety of his remaining on the panel,

Hill Rivkins should consider withdrawing from the Mary S. arbitration if it perceived a conflict. Carey did not reply.

Thereafter, on May 16, 1978, Cederholm gave 80 pages of testimony in the Mary S. Arbitration #2, including cross-examination by a Hill Rivkins attorney. One final hearing was held in the Ross Isle arbitration on June 6, 1978. Over a year later, on July 1, 1979, the Ross Isle panel unanimously held that the vessel's grounding was caused by International's breach of its warranty of safe port and awarded Rosshavet $1,194,535.57, plus interest to the date of the award, with further annual interest of 9% if payment was not complete by July 31, 1979. On July 27, 1979, International petitioned the district court for an order vacating the award; on August 21, Rosshavet cross-petitioned seeking confirmation.

Judge Broderick, in a memorandum opinion of April 16, 1980, vacated the award under 9 U.S.C. §10(b), on the ground that the totality of Cederholm's relationship to the Haight Gardner and Hill Rivkins law firms "created the appearance of bias." We disagree.

The United States Arbitration Act of 1925, 9 U.S.C. §10 (1976), authorizes a district court to vacate an arbitration award under specified circumstances, including "[w]here there was evident partiality or corruption in the arbitrators, or either of them."[2] In believing that the standard for reviewing the award was whether there was an "appearance of bias," the district court was equating that standard with "evident partiality." We do not

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[2] 9 U.S.C. §10 (1976) provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.

find support in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), for the district court's equating of "appearance of bias" with "evident partiality" in view of the facts of that case.

In *Commonwealth Coatings,* the challenged arbitrator had earned about $12,000 in fees over a period of four or five years for consulting services rendered to the prevailing party which included services on the very project there involved. The arbitrator did not disclose this relationship and it was not known to the losing party. Mr. Justice Black's plurality opinion found that the arbitrator's failure to disclose required setting aside the award for "evident partiality." He wrote that an arbitration panel "not only must be unbiased but also must avoid even the appearance of bias." 393 U.S. at 150.

However, Mr. Justice White, writing for himself and Mr. Justice Marshall, concurred for somewhat different reasons:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. . . . [I]t is enough for present purposes to hold, as the Court does, that where the arbitrator has a *substantial interest* in a firm which has done more than trivial business with *a party* [to the arbitration], that fact must be *disclosed.*

393 U.S. at 151-152 (emphasis added). Thus two of the justices restricted the scope of the Court's ruling to situations where business and financial dealings with a party are not disclosed by the arbitrator and disassociated themselves from Justice Black's dictum about "appearance of bias." Three justices dissented.

We agree, therefore, with the appellant, that the Supreme Court in *Commonwealth Coatings* did not expand the §10 standard of "evident partiality" to include "appearance of bias." In

Commonwealth Coatings there was clear, unexplained evidence of "evident partiality." Here we have an assertion of "appearance of bias" which seems to us, at best, to be speculation without substance.[3] Cederholm fully revealed his relationship to Haight Gardner, and Carey did not inquire further. *See Andros Compania Maritima S.A. v. Marc. Rich & Co., A.G.*, 579 F.2d 691 (2d Cir., 1978). The Mary S. Arbitration #2, which only developed into an arbitrable dispute later, did not involve either of the parties in the Ross Isle arbitration. By happenstance, it did involve the same law firms, but Cederholm's role was only that of a witness who testified and was cross-examined by the Hill Rivkins lawyer. There was no claim of bias on the part of Cederholm, or even of any animosity toward any counsel. Thus, the record is completely bare of anything remotely resembling "evident partiality." *See Ilios Shipping and Trading Corp. v. American Anthracite and Bituminous Coal Corp.*, 148 F. Supp. 698 (S.D.N.Y.), *aff'd*, 245 F.2d 873 (2d Cir. 1957) (per curiam). We doubt that there is any substantial basis for finding even an "appearance of bias" in Cederholm's position or anything he did. Be that as it may, we are convinced that there is no evidence of "evident partiality."

It is not unusual that those who are selected as arbitrators in maritime arbitrations have had numerous prior dealings with one or more of the parties or their counsel. Cederholm's extensive involvement in the maritime community was not unique; both of the other arbitrators revealed past dealings with one of the parties. Arbitrator Klosty aptly analogized New York's maritime-arbitration community to a busy harbor, where the wakes of the members often cross.

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[3]It does not follow that an arbitrator's personal feelings in favor of or against one attorney would necessarily be transferred to another attorney in the same firm. Our situation is thus radically different from that of an arbitrator who has close personal dealings with the very same attorney who is arguing before that arbitrator. *See, e.g., Sanko S.S. Co. v. Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir. 1973). Of course, here there is no suggestion that Mr. Cederholm was in fact biased either for or against any particular attorney.

The most sought-after arbitrators are those who are prominent and experienced members of the specific business community in which the dispute to be arbitrated arose. Since they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results. *See, e.g., Garfield & Co. v. Wiest,* 432 F.2d 849 (2d Cir. 1970), *cert. denied,* 401 U.S. 940 (1971). Those chosen as arbitrators in important shipping arbitrations have typically participated in a great number of prior maritime disputes, not only as arbitrators but also as parties and witnesses. They have therefore almost inevitably come into contact with a significant proportion of the relatively few lawyers who make up the New York admiralty bar. Under these circumstances, a decision on our part to vacate arbitration awards whenever a mere appearance of bias can be made out would seriously disrupt the salutary process of settling maritime disputes through arbitration. We are convinced that the goals of the arbitration system would not be served if arbitrators and Article III judges were held to the same high standard. To vacate an arbitration award where nothing more than an appearance of bias is alleged would be "automatically to disqualify the best informed and most capable potential arbitrators." *Commonwealth Coatings, supra,* 393 U.S. at 150 (White, *J.*, concurring). This we decline to do.

Finally, we see no merit in International's assertion that Cederholm's conduct violated section 9 of the Rules of the Society of Maritime Arbitrators, which requires an arbitrator to disclose, no later than the first hearing, any relationship with counsel for either party, Cederholm fully revealed his connection with Haight Gardner at the first hearing on September 8, 1977. Developments thereafter in the Mary S. Arbitration #2 were considered by the other arbitrators at Cederholm's request. We think it significant that, after all the relevant facts regarding any possible bias on Cederholm's part were disclosed to counsel and the arbitrators, the other two arbitrators—including, of course, the one selected by International—saw no impediment to Cederholm's continuing as arbitrator and urged him to remain.

We therefore reverse the district court's order which vacated the award on grounds of "appearance of bias," and remand with directions to confirm the award.

Memorandum and Order of the United States District Court, Dated April 16, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration

—between—

INTERNATIONAL PRODUCE, INC.,

Petitioner and Cross-Respondent,

—and—

A/S ROSSHAVET, Owner of the S.S. ROSS ISLE,

Respondent and Cross-Petitioner.

79 Civ. 3920 (VLB)

Memorandum Order

VINCENT L. BRODERICK, U.S.D.J.

I.

This case is before me on a petition to vacate a maritime arbitration award and a cross-petition to confirm.

The only issue raised concerns the propriety of an arbitrator's refusal to disqualify himself when he acquires an active interest as a businessman in another arbitration in which

a) his side is represented by counsel to one of the parties in the arbitration before him;

b) the opposing side is represented by counsel to the other party in the arbitration before him; and

c) the arbitrator is expected to testify as a witness and be examined and cross-examined by the law firms who represent the parties in the arbitration before him.

For the reasons which followed the petition to vacate is granted and the petition to confirm is denied.

II.

This action arises out of a charter party between petitioner International Produce, Inc. ("charterer") and A/S Rosshavet ("owner") for the hire of the S.S. Ross Isle. When a dispute arose between the parties, they submitted it to arbitration as provided by the agreement. Pursuant to the Rules of the Society of Maritime Arbitrators, the charterer chose one arbitrator, the owner chose another, and the two arbitrators then chose a third, Mr. Hammond L. Cederholm, the controversial figure in this action. Mr. Cederholm is, and was at the time of his selection, a vice president of James W. Elwell & Co., Inc. ("Elwell"), a firm which renders management services for the owners of commercial vessels.

The first hearing was held on September 8, 1977 at which time counsel for both parties made opening arguments. The owner was represented by the law firm of Haight, Gardner, Poor & Havens ("Haight Gardner") and Hill, Rivkins, Carey, Loesberg & O'Brien ("Hill Rivkins") represented the charterer. No witnesses were called. Mr. Cederholm at that time disclosed that Haight Gardner was "handling one P&I case of ours."

At the time he made his disclosure, Mr. Cederholm invited further inquiry by Mr. Carey of Hill Rivkins, counsel to the charterer. Mr. Carey declined the invitation and stated that the panel was acceptable to the charterer. Had Mr. Carey inquired further, he would have learned that a vessel called the "Mary

S", managed by the Elwell firm, was involved in the "P&I case" to which Mr. Cederholm referred.

On December 6, a second hearing was held. The arbitrator chosen by the owner had become ill and was unable to attend. Because the owner's two scheduled witnesses had travelled from Norway and Louisiana to give testimony, the parties agreed to proceed with the hearing, on the understanding that the missing arbitrator would read the transcript. At the hearing the master and the pilot of the Ross Isle testified on behalf of the owner.

Two days later, on December 8, another incident occurred involving the Mary S. Mr. Cederholm on behalf of the Elwell firm was personally involved in the negotiations and activities of December 8 and 9 which led to a dispute between the owner of the Mary S and its charterer. The charterer retained Hill Rivkins to represent them in taking that claim to arbitration. The owner's P&I club retained Haight Gardner. Although neither of the individual attorneys representing the parties to the Mary S arbitration, Francis O' Brien of Hill Rivkins and Thomas Howarth of Haight Gardner, was involved in the Ross Isle arbitration, one Haight Gardner associate, Howard Miller, worked on both arbitrations. From the outset, there appeared to be a substantial likelihood that Mr. Cederholm would be called as a witness in the Mary S. case by Haight Gardner and would be cross-examined by Hill Rivkins.

Several days after Hill Rivkins was retained in connection with the Mary S arbitration, the circumstances came to Mr. Carey's attention. Shortly thereafter, in early January of 1978, he requested by telephone that Mr. Cederholm withdraw from the Ross Isle arbitration on the grounds that the roles to be played by Haight Gardner, Hill Rivkins and Mr. Cederholm in the upcoming Mary S arbitration would give rise to a presumption of bias on the part of Mr. Cederholm. Mr. Cederholm stated that he had been planning to make full disclosure at the next hearing and that he would take the matter under advisement while soliciting the views of opposing counsel and the other arbitrators.

Those views were solicited, and supported Mr. Cederholm's continuation on the Ross Isle panel. Mr. Cederholm informed Mr. Carey, by letter dated January 13, that he declined to disqualify himself. He premised that decision on the condition that Howard Miller of Haight Gardner, who was involved in both arbitrations, divorce himself from one of the two. Mr. Miller was promptly withdrawn from the Mary S arbitration. Mr. Cederholm also asked Mr. Carey to "confirm to all you are still prepared to proceed with the hearing scheduled for January 17th and 18th." Mr. Carey responded on January 16 that "the charterer will proceed with the introduction of evidence at the hearing scheduled for January 17th."

The latter hearing was cancelled due to a death in Mr. Cederholm's family. On January 26 Mr. Cederholm again wrote to Mr. Carey noting that "your letter of January 16th did not concede or acknowledge the propriety of me remaining as Chairman" and suggesting that, if he continued to be troubled by the situation, Mr. Carey's firm should consider withdrawing from the Mary S arbitration. Mr. Carey did not reply. One further hearing was held on June 6.

Mr. Cederholm was called as a witness in the Mary S arbitration, gave 80 pages of testimony, and was vigorously cross-examined by Mr. O'Brien of Hill Rivkins.

On July 1, 1979, the arbitrators in the Ross Isle arbitration rendered a unanimous decision in favor of the owner. The charterer filed this petition to vacate.

III.

The basis for the motion to vacate is the "appearance of bias" created by Mr. Cederholm's dual role.[1] *See* 9 U.S. §10(b) as

[1]I have considered the argument that by proceeding with the arbitration despite its objections, and by failing to enunciate its objections at

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construed by *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). The owner insists that the award may be vacated only if "evident partiality" by the arbitrator is established.

A majority of the Court in *Commonwealth Coatings* concurred in holding that when facts reasonably creating the appearance of partiality are undisclosed, the award may be vacated; there is no need to probe the mind of the arbitrator nor to identify evidence of actual bias. *Sanko S.S. Co.* v. *Cook Industries Inc.*, 495 F.2d 1260, 1263 (2d Cir. 1973); *Overseas Private Investment Corp.* v. *Anaconda Co.*, 418 F.Supp. 107 (D. Colo. 1976). In order for arbitration to remain effective, arbitrators must not only be honest, but also above suspicion.

Disclosure alone does not discharge the arbitrator's responsibility. If the disclosure gives rise to a well-founded objection, the arbitrator must disqualify himself. "The point is, obviously,

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every occasion, the charterer waived those objections. I reject this argument.

Charterer's counsel were interested in an unbiased arbitration. They were also interested in a successful arbitration. Once the objections to the arbitrator had been enunciated and turned down, the next opportunity which the charterer had to raise his objections, without imperilling its chances of success in the arbitration, was in the petition to this court, which only could be made after the arbitrators had issued their award.

It could also be argued that the charterer waived its objection to the Cederholm-Haight Gardner relationship when Mr. Cederholm disclosed on September 6th his firm's retention of Haight Gardner in connection with "one P&I case of ours" and the charterer declined an invitation to make further inquiry and allowed the arbitration to proceed. The events of December 8 and 9, however, added new dimensions to the relationship: Mr. Cederholm became personally involved and it became likely that he would work closely with a Haight Gardner attorney in preparing to testify. The charterers no doubt declined to make further inquiry on September 6 because they were confident that, had Mr. Cederholm personally had any substantial contact with the "P&I" case which was the subject of disclosure, the nature of that contact would also have been disclosed.

that disclosure is necessary to afford grounds and opportunity for objection." *Miserocchi* v. *Peavey International Inc.*, 78 Civ. 1571 (S.D.N.Y. Sept. 15, 1978) (Frankel, J.).[2]

An arbitration award is presumptively valid. The burden therefore rests on the party asserting the appearance of bias. *Reed and Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971). I find that the charterer has met that burden. The totality of Mr. Cederholm's relationship to both law firms handling the Ross Isle matter created the appearance of bias. While the most compelling case for disclosure and disqualification is undoubtedly an arbitrator's direct involvement with a party, an arbitrator's involvement with attorneys representing a party may also create the appearance of bias. *Sanko S.S. Co.* v. *Cook Industries, Inc., supra* at 1263 (proof of substantial and continuous contacts between attorney and arbitrator might require vacation of award).

The subtle biases which sometimes arise out of a working or an adversarial relationship with an attorney may unconsciously be transferred to the client he represents. The arbitrator's exposure to the facts and issues in arbitration, after all, is through the attorneys and not through the parties; his rapport and ability to communicate with the attorneys may well have a substantial impact on the course of a proceeding.

In this case there was not only a potential for bias in favor of the owner but also a potential for bias against the charterer. The risk that potential might become actual bias was aggravated by Mr. Cederholm's active involvement in the Mary S case, re-

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[2]Judge Frankel's decision emphasizes how easy and costless it is to replace an arbitrator when proper disclosure is made an exception taken at the outset of arbitration. It would probably be reasonable to require a stronger showing of potential bias when the bias does not arise until substantial money and effort have been invested in arbitration proceedings. In any event, I find that the showing made in this case was strong enough to have merited replacement of Mr. Cederholm even though some testimony had already been taken.

sulting in his consultation with the owner's counsel and his cross-examination by the charterer's counsel. The relationship between a witness and the lawyer cross-examining him may be an intensely adversarial one.[3]

The owner suggests, relying on the decision of Judge Haight in *Transmarine Seaways Corp.* v. *Marc Rich & Co. A.G.*, 79 Civ. 1439 (June 18, 1979), that the only basis for finding impartiality in an arbitrator is his direct financial or professional interest in a party. I find this criterion arbitrarily limiting. The concept of bias encompasses infinitely more than a financial relationship; surely no one would contend that a blood relationship between the arbitrator and a party or his attorney or an arbitrator's strong racial, political or other prejudice against a party or his attorney would fall outside its scope. The overwhelming concern with financial relationships reflected in the cases is simply a function of the frequency with which they occur in a commercial setting and the relative ease with which they can be identified. I read the cases not as requiring indications of financial dealings, but as requiring strong indications of potential bias of whatever nature.

Once it is recognized that financial relationships are not the only suspect ones, it becomes evident that the relationships to which the charterer in this case objected were far more "substantial" than most of those involved in the cases relied on by the owner. In *Andros Compania Maritima, S.A.* v. *Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978), affirming confirmation of an arbitration award, the district court had found that the disputed relationship between an arbitrator and the president of one of the parties' domestic agents was a relationship confined almost exclusively to their shared experiences as arbitrators. *Id.*

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[3]It is not clear from the record, and was never made clear despite a request from the court at the time of oral argument, at precisely what stage in the Ross Isle arbitration Mr. Cederholm testified before the Mary S arbitrators.

at 701.[4] Even repeated contacts of a non-partisan, disinterested nature like the contacts among arbitrators are unlikely to give rise to the appearance of bias. In this case, by contrast, the contacts were of an exceedingly partisan nature. In *Transmarine, supra*, at 11, "[the arbitrator's] company represented another company which in turn asserted a claim (entirely unrelated to those at the bar) against [the complaining party]." This case is distinguished from *Transmarine* by the greater number of potential conflicts affecting Mr. Cederholm (conflicts involving both parties) and by his personal involvement in the arbitration giving rise to those conflicts.[5]

I recognize the policy of insulating arbitration proceedings as much as possible from interference by the courts. It is in implementation of this policy that the courts have insisted on proof of a substantial potential for bias before considering vacation. I find, however, that the unusual conjunction of contacts by Mr. Cederholm personally with both law firms participating in the arbitration before him brings this within that special class of cases requiring vacation.[6]

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[4]The court of appeals also emphasized that the relationship would have been obvious upon the most superficial inquiry—finding, in effect, a constructive waiver. *Id.* at 702. In this case, the relationship did not arise until after arbitration had begun, and objection was made almost immediately thereafter.

[5]I disagree with the reasoning and the outcome of another case on which the owners have placed considerable reliance, *Standard Tankers (Bahamas) Co.* v. *Motor Tank Vessel, AKTI*, 438 F.Supp. 153 (E.D.N.C. 1977). The court in that case held that "to constitute evident partiality, some overt misconduct or demonstration of partiality is required"—a holding which seems to me inconsistent with the Supreme Court's decision in *Commonwealth Coatings*. I would have found the lawyer-arbitrator's litigation connections with both parties to the arbitration ample grounds for vacating the award in *Standard Tankers*.

[6]The maritime community in New York is a relatively small one. It is certainly desirable that arbitrators in maritime matters be conversant with maritime customs and practices and hence it is inevitable that they will be drawn from various phases of active business practice in that com-

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SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
April 16, 1980

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munity. It follows that a certain measure of interrelationship between arbitrators and parties or their counsel may exist or may develop. In normal course these can effectively be handled through the practices of disclosure and waiver (as was done with respect to the original interrelationship in the case at bar involving Elwell's P&I case and Haight Gardner). The extent and nature of the interrelationships which developed in the course of the S.S. Ross Isle arbitration rendered them not susceptible to such effective handling.

Order and Judgment of the United States District Court, Dated May 7, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of Arbitration

—between—

INTERNATIONAL PRODUCE, INC.,

Petitioner and Cross-Respondent,

—and—

INTERNATIONAL PRODUCE, INC.,
A/S ROSSHAVET, Owners of the S.S. ROSS ISLE,

Respondent and Cross-Petitioner.

79 Civ. 3920 (VLB)
Order

VINCENT L. BRODERICK, U.S.D.J.

Pursuant to Rule 60(a), Fed.R.Civ.P., the Clerk of the Court is directed to correct the Judgment in this matter dated April 30, 1980 so that it conforms to the Memorandum Order dated April 16, 1980 and reads as follows:

> Petitioner having moved to vacate a maritime arbitration award, and the respondent having cross-petitioned for an award confirming the award, and the said motions hav-

ing come on before the Honorable Vincent L. Broderick, United States District Judge, and the Court thereafter on April 18, 1980, having handed down its memorandum order granting the petitioner's motion and denying the respondent's cross-petition, it is,

ORDERED, ADJUDGED and DECREED: That the petitioner's motion to vacate the arbitration award is granted, and it is further,

ORDERED: That the respondent's cross-petition to confirm the award is denied.

SO ORDERED.

Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
May 7, 1980

Order and Judgment Entered February 23, 1981 by the United States District Court Pursuant to Mandate of the United States Court of Appeals

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration

—between—

INTERNATIONAL PRODUCE, INC.,

Petitioner and Cross-Respondent,

—and—

A/S ROSSHAVET, Owners of the S.S. ROSS ISLE,

Respondent and Cross-Petitioner.

Order and Judgment
79 Civ. 3920 (VLB)
No. 81, 0198

WHEREAS, a Judgment Order of the United States District Court for the Southern District of New York dated May 7, 1980, vacating an award of arbitrators was appealed to the United States Court of Appeals for the Second Circuit, where it was reversed and remanded on January 8, 1981 with instructions to confirm the award; and

WHEREAS, costs of the appeal amounting to $2,782.66 were entered against the Petitioner and cross-Respondent; and

Order and Judgment Entered February 23, 1981 by the United States District Court Pursuant to Mandate of the United States Court of Appeals

WHEREAS, the mandate of the Court of Appeals was filed in this Honorable Court on February 10, 1981;

NOW, THEREFORE, it is ORDERED, ADJUDGED AND DECREED, that final Judgment be entered confirming the arbitration award in favor of Respondent and Cross-Petitioner, in the sum of $1,194,535.57 plus interest at 9% on the principal amount of $870,308.43 from July 1, 1979 to the date of entry of this judgment, plus costs of the appeal in the amount of $2,782.66, plus exoneration for Petitioner and Cross-Respondent's share of the arbitrators' fees and expenses, which amount to $9,200.00 as stated in appendix B of the award; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that unless this Judgment be satisfied within ten (10) days after entry of this Judgment, execution shall issue against the Petitioner and Cross-Respondent, its goods, chattels and lands forthwith to satisfy this Judgment.

Dated: New York, New York
February 23, 1981

Vincent L. Broderick
U.S.D.J.

Judgment Entered 2/23/81

Raymond F. Burghardt
Clerk

Arbiration Award, Dated July 1, 1979

In the Matter of the Arbitration

—between—

INTERNATIONAL PRODUCE, INC.,

Charterers

—and—

A/S ROSSHAVET, Owner of the S/S ROSS ISLE,

Owners

Decision
&
Award

Before Arbitrators: Mack G. Klosty
Lloyd C. Nelson
H. L. Cederholm,
Chairman

Appearances:

Attorneys on behalf of Charterers —
Hill, Rivkins, Carey, Loesberg & O'Brien
J. Edwin Carey, of Counsel

Attorneys for Owners —
Haight, Gardner, Poor & Havens
John C. Moore & Mark C. Flavin, of Counsel

Background:

These proceedings were initiated by Charterer on May 17, 1974 with their appointment of the late Mr. Edward Schilling as Arbitrator, who, after his death, was replaced by Mr. Mack

G. Klosty. Owners appointed Mr. Lloyd C. Nelson, and both agreed upon Mr. H. L. Cederholm to be Arbitrator—Chairman of the Panel on August 29, 1974. The parties did not proceed with the first hearing until September 8, 1977, when it was agreed that the Rules of the Society of Maritime Arbitrators would apply, except Sec. 32. During 4 additional hearings the parties submitted considerable evidence with Charterers and Owners each presenting 2 witnesses. Following main briefs and reply briefs from both sides, the latter received on September 19, 1978, each party then submitted supplemental material the last being received on January 3, 1979.

Their disputes arise out of a New York Produce Exchange form of charter party dated March 7, 1974 when Owners time chartered the S/S ROSS ISLE to Charterers for "two transatlantic round voyages via Mississippi River and/or Galveston, at Charterer's option always safe and afloat at loading and discharging berths, . . . vessel only to carry grain and/or grain products, . . . between safe ports and/or ports in Worldwide Trading Limits within I.W.L. —". Two round voyages were performed, each between New Orleans (Destrehan)/Galveston and Rotterdam. On the first voyage, the subject of this arbitration, the vessel stranded in the Mississippi River on a mud lump resulting in extensive damages to hull, internal(s) rudder and propeller which were subsequently repaired at a shipyard in Rotterdam on completion of the second voyage.

The ROSS ISLE is an OBO carrier flying Norwegian flag, of 111,910 tons DWT with SSW draft of 54′-1″, built in January 1974.

Vessel was delivered to Charterers retroactively to dropping seapilot outbound from Europort March 2, 1974 at 1400 hours, under Charterers' orders to proceed to Destrehan to load a part-cargo of grain to a draft of 34 feet, thence to top-off at Galveston with an additional grain part-cargo.

Vessel arrived at the New Orleans anchorage on March 15th

at 2000 hours but was not inspected by NCB or the Destrehan Board of Trade or local grain inspectors (Board of Trade), as required by Clause 46 of the charter party rider clauses, until March 16th at 0800 hours. All holds were found to contain oily residues from a previous cargo so vessel shifted to a layberth where holds were cleaned until March 21st at 1200 hours when the inspectors passed them as fit to load. Charterers placed the vessel off-hire from 2100 hours on March 15th until 1200 hours March 21st because they consider she had not complied with a further requirement in Clause 46 — "Vessel to be clean for grain on arrival at first loading port — — —. If vessel not accepted, to be off-hire until approval obtained."

After shifting to the Bunge Grain Elevator at Destrehan for loading on March 22nd, vessel was informed by Charterers' loading superintendent that the Mississippi Bar Pilots had increased the previously advised 34 feet load draft to 36 feet as the recommended draft for passing Southwest Pass. Accordingly, Charterers wanted the ship to be loaded to 35′-6″.

Loading took place from 1110 hours March 22nd through 1820 hours on March 24th whereupon vessel immediately proceeded downriver at 2100 hours loaded with 57,418.151 L.T. of corn and soyas in bulk and with the requested draft of 35′-6″ fore and aft. Pilots were changed in customary manner first at New Orleans at 2325 hours, then again at Pilottown at 0359 hours March 25th. Under conn of the pilot, vessel continued toward Southwest Pass at various speeds, when at 0430 hours, after passing a dredge at work in the Channel, the ROSS ISLE stranded at One Mile Point, Southwest Pass on what was described as probably a mud lump of silt. Charterers were notified and placed the vessel off-hire as of the stranding time.

Neither the Pilot nor the Master at first thought the vessel hard aground, so the engines were worked full speed, turning the rudder alternately to port and starboard. This proved to no avail, and the vessel settled in the mud, broaching the river with

her bow pointing out in the Channel. During the next 7 days twelve different tugs were engaged on and off at Owner's expense to try to push her off the strand, and a dredge was even employed to undercut the silt holding her fast. Finally on April 1st she was refloated at 1305 hours and the Master notified Charterers accordingly.

Vessel then proceeded back upriver to Pilottown for instructions and survey for seaworthiness. A grounding occurred on this short passage at 1312 hours but vessel became free by her own efforts at 1325 hours on April 1st. Det Norske Veritas inspected at Pilottown and issued a Certificate of Seaworthiness at 1700 hours that same day valid until vessel's next regular drydocking in December 1974. The Master advised Charterers he was ready to sail but was awaiting an increase in the Southwest Pass controlling draft to permit him to do so safely.

On April 2nd the Bar Pilots Association changed the recommended draft for passing out through Southwest Pass from 36 feet to 35 feet and, probably mindful of the ROSS ISLE incident, further stipulated that vessels over 80,000 DWT must hereafter be 2 feet less than any recommended draft for smaller vessels. Since the ROSS ISLE now had to be off-loaded to reduce her draft from 35′-6″ to 33′-0″ in order to leave the port the Charterers at first agreed to arrange the lightening but demanded that the Owners pay the corresponding expenses for unloading, storage and re-shipment by a subsequent steamer of the discharged quantity and agree to off-hire for the relative period from the time of stranding until the vessel again passed the point of stranding outbound. This, Charterers contend, is mandated by Charter Clauses 26 (Navigation) and 15a (Return to same position after interruption). (See Appendix A for full text of clauses.)

The Owners refused to pay any such expenses or to allow hire deductions to be placed in escrow, as it was their position that Charterers were responsible for all time, costs and conse-

quences of the entire incident. It was agreed their opposing views would be resolved through arbitration and Charterers proceeded to lighten the vessel of 6,544.33 L.T. of soyas at their expense at New Orleans from April 6th to 9th, whereupon vessel sailed for Galveston with an even keel draft of 33 feet and 50,873.821 L.T. of cargo on board. She cleared the point of original stranding at 1335 hours on April 9th and arrived at Galveston on April 10th. Following a loading there of 17,079.312 L.T. of wheat and milo in bulk the ROSS ISLE sailed at 1655 hours on April 14th with a total cargo of 67,778 L.T. and a mean draft of 39 feet brackish water. The Charterers contend that No. 8 hold was left slack and shortloaded 949 L.T. of grain at Galveston for which they claim deadweight deficiency and a pro-rata reduction of hire during the voyage. The Owners refute the claim and state that the loading was stopped to meet the sailing draft restrictions prevailing at Galveston.

This cargo was discharged without incident at Rotterdam. The vessel made the same round voyage again, this time without incident, and then upon conclusion of the timecharter, drydocked at Rotterdam and repaired the damages outstanding from the stranding.

Claims:

By submission agreement dated September 8, 1977 and subsequent agreed amendments thereto, the parties listed the following claims:

Charterers' Claims:

1.	Off-hire from end of grounding 1305 hrs 4/1/74 'til re-passing grounding point 1335 hrs 4/9/74 incl o/t (off-hire for grounding withheld from hire)	$138,172.21

2.	Fuel oil and diesel oil relating to same period	19,228.39
3.	Loading originally the lightened 6554.33 L.T. soyas	2,481.96
4.	Discharging for return to elevator 6554.33 L.T. soyas	22,513.21
5.	Wharfage on same	3,396.96
6.	Barging on same	14,642.00
7.	Elevation on same	4,839.00
8.	Pilotage and tugs	10,662.18
9.	Agency and draft survey fees	1,200.00
10.	Short loading 949 L.T. at Galveston	11,094.38
	Total	$228,285.19

Owners' Claims:

1.	Off-hire withheld from 2000 hrs 3/15/74 to 0930 hrs 3/16/74 being retroactive period before holds inspection on 3/16/74	$ 9,377.42
2.	Off-hire withheld from 0430 hrs 3/25/74 to 1305 hrs 4/1/74 for actual period of grounding	122,658.97
3.	Towage, pilotage and other disbursements arising out of grounding	160,314.31
4.	Crew overtime while vessel aground	2,947.21
5.	Salary and expenses of Owners superintendent attending during grounding	2,171.10
6.	Lube oil costs to bring vessel afloat	997.44
7.	DNV survey fees after grounding	1,045.00
8.	Loss of time while vessel repairing	370,527.34
9.	Bunker consumption proceeding to, lying at and departing from repair yard	4,974.30
10.	Cost of repairing vessel damages at Rotterdam	325,423.92

11.	Crew overtime during repair period	4,941.26
12.	Salary and expenses of Owners superintendent attending repairs at Rotterdam	3,693.66
	Total	$1,009,071.93
	Less cargo's contribution to General Average	132,755.88
	Owners' Net Claims	$ 876,316.05

Both sides seek interest, costs and attorney fees in addition to the above amounts.

Argument by Charterers:

It is Charterers' position that the stranding of the ROSS ISLE was a navigational hazard experienced by the vessel during a river transit and, as such, is within Clause 26 of the Charter. They feel it is well established by precedents that the owner must bear the risk of navigational hazards and perils of the sea which may interrupt the voyage as long as the charterer has complied with all of his obligations and conditions precedent in the charter party. They feel it is appropriate to link together in this situation the safe berth (line 15) and safe port (line 27) warranties contained in the contract because they relate one to the other in this matter. Accordingly, Charterers hold no safe berth/safe port warranty applies in this case because there is an identification of the loading ports or range in lines 14/15 describing the period of the charter as "Two — — — voyages Via Mississippi River and/or Galveston — — —".

They point to the 18th Edition of Scrutton Page 153 where it is stated "When once the loading is completed the Charterer's obligation is fulfilled and subsequent delays, such as by ice, or failure to procure clearance, must fall on the shipowner — — —".

Charterers further cite particular cases where the charterer was absolved from the known silting vagaries of the Mississippi on the basis that since the river was specifically identified in the charter party, the Owners accepted it as safe as in full recognition of the known fluctuations and navigational hazards related thereto.

Charterers point out that there is no question the vessel was loaded "always safe and afloat" at her loading berth to the Master's satisfaction because no protest or objection was ever registered by him about the cargo quantity or the ship's draft or the river.

They argue that the criteria for safe port purposes must be the recommended draft by the official pilots of the river. The ROSS ISLE was loaded 6 inches less than the recommended draft of 36 feet when she originally sailed from Destrehan. This, coupled with the fact that both the Master and the pilot found the vessel's 35'-6" acceptable and safe for departing downriver, leaves Charterers blameless for subsequent events because "Acts of pilots" are also Owners' responsibility under Clause 26.

They suggest that the Master, although admitting he had been on the river a few times prior to the call, may be negligent because he did not make an investigation of navigational conditions on the river before this call in March 1974. Intimate knowledge of the vessel is possessed by the Master alone, so responsibility of navigational performance must rest with the Owners, and certainly not with them, say the Charterers, because they are not nautical experts, nor is there much they know about the ship. Thus, when the ROSS ISLE, has a propensity to "squat" 1½ to 2 feet, as it was brought out some large ships do in shallow navigation, neither the knowledge nor the consequences of this can fall to Charterers.

With final regard to the navigational aspect of the case, Charterers hold that the stranding was due to an abnormal, unusual,

unknown and unforeseeable mud lump condition in the river and Owners must suffer the consequences.

Charterers state the lack of clean holds when the ROSS ISLE arrived in New Orleans violated a condition precedent, upon which the retroactive commencement of hire was based. Even though they did not inspect the holds until 13½ hours later after vessel arrived at 2000 hours March 15th, the vessel should be off-hire from her "arrival" in accordance with the wording of Clause 46, and not as of the time of survey and rejection at 0930 March 16th, as Owner contend.

Charterers petition the Panel to read Clause 15a so as to also include line 98 (not just lines 97 and 99) which omission they claim was typographical. Owners admit off-hire during the stranding and while the vessel was lightened as a technical breach of Clause 15 but they claim damages for the same period in consequence of Charterers' safe port breach. Charterers aver that it was never the intention of the parties that the "grounding" exception of line 98 be excluded because this is not consistent with other parts of the charter that show this to be a logical conclusion. They feel that Owners' claim for lightening time after refloating cannot be considered as time used for Charterers' purposes as owners allege because the proper reinstating of "line 98" into Clause 15a would be an express term putting the vessel off-hire anytime she turned back for lightening on account of such express exception until she was "again in the same position" re-passing the point of stranding 8 days later outbound.

Owners declared General Average on the occasion of the stranding and cargo interests contributed along with vessel interest as required under Clause 19 of the charter. Owners' election to receive such contribution from cargo, argue the Charterers, precludes Owners right to arbitrate the issue or to recover further damages over and above the General Average settlement already received.

Arbitration Award

Argument by Owners:

Owners counter-position to the above is that the Mississippi River and/or Galveston were not mentioned expressly as loading ports nor were they specified as such in the usual place in the N.Y. Produce Exchange Time Charter Form. Rather, Charterers were free to trade worldwide within Institute Warranty Limits, so long as the vessel was directed "between safe port and/or ports." Owners state this reference to "Mississippi River and/or Galveston" simply specified the probable route, not the loading ports per se, because the Charterers had the option to load at numerous Mississippi River ports alone or Galveston alone or combined with the former, or anywhere else within I.W.L. provided they chose a voyage "via Mississippi River and/or Galveston."

Owners argue that not one legal or arbitral precedent cited by Charterers supports in any manner the safe port warranty meaning that Charterers urge in this arbitration. Charterers try to equate this case with voyage charter parties and that Owners say, is erroneous. They acknowledge that an owner accepts an allocation of risks concerning the safety of the port in a voyage charter party for named ports. The same cannot be construed for the timecharter contract, because only the space on the ship in a voyage charter is contracted by the charterers for the movement of their cargo in a manner the owner controls. However, when the owner allows the timecharterer to direct and employ the vessel as the charterer sees fit, he does so only in return for charterer's warranty they will trade the vessel expressly between safe ports. When charterers so warrant the safety of a port, they guarantee that the vessel can safely proceed to, load and/or discharge and return from the port all in relative safety.

Contrary to Charterers' allegations, Owners say, instead of named ports in this charter party, there is an expressed range from which Charterers have the option of selecting the loading port (s). The Handy Books for Shipowners and Masters (1964

Edition at 182) is cited to show that when charterer is given the right to select a safe port out of a specified range or alternatively a list of named ports, he is deemed to warrant that the port he nominates is a safe one. It is unrealistic, the Owners feel, to expect owners to investigate all possible loading alternatives within ranges to establish their safety.

Owners say Charterer's negligence charge against the Master is improper because in American President Lines, Ltd. v. United States, 1968 AMC 830 (N.D. Cal.) at 832-833 it was held that the degree of negligence a Master must display in navigating his vessel before a charterer's breach of the safe port warranty will be excused on the grounds of intervening negligence, is

> ". . . The charterer is not relieved of legal responsibility for the consequences of his breach of contract unless the course followed by the captain is so imprudent that it can fairly be said to be an intervening act of negligence. It is not enough that the course followed by the captain entails some foreseeable risk of harm. For, some risk is inherent in any attempt to proceed to an unsafe port. *To constitute an intervening act of negligence, the course followed by the captain must entail an unreasonable risk.*
>
> For the law, as established by the cited decisions, is that action taken by a master in an effort to comply with the demand of a charterer that he proceed to an unsafe port does not constitute an intervening act of negligence merely because the action taken entails some foreseeable risk. To break the chain of causation, the master's action must entail a risk that is unreasonable under all the circumstances."

The Owners argue that no law or precedents whatsoever were put forth by Charterers to support the indirect consequences of lightening time and expenses they claim against Owner following the express "grounding" exception in Clause 15 that allows Charterers to put the vessel off-hire. Without relying on the absence of "line 98" in Clause 15a Owners admit that the vessel

was technically off-hire during the period vessel was hard aground but at the same time Charterer's are liable to Owners for the same period as damages for breaching the Safe Port Warranty.

Furthermore, they say, Clause 15a simply says the off-hire event ceases when the vessel is "in the same position." Owners state that upon refloating the ship was in the same position as when she went aground. Therefore she was back on hire when afloat again and not after re-passing the grounding point following Charterer's discharge and lightening up-river at New Orleans because lightening to meet reduced river draft is Charterer's obligation even if no stranding had occurred.

Since Clause 15a only applies where the off-hire event results in delays for "owners purposes," Owners say no such purposes occurred. Rather the lack of water in the river, like an obstruction of a broken bridge, was a time-charterers' risk. Charterers could have let the vessel wait for higher water to sail, but they elected to lighten to save hire time for their own account.

Owners argue Charterers claim of 949 tons shortloaded at Galveston is totally unsupported in that all Charterers can point to is some unused space in No. 8 hold, which they concluded in all likelihood was attributable to deballasting problems of the vessel. Since the vessel did deballast to accommodate additional cargo and no fault are shown on the Statement of Facts Owners' position is that perhaps there was no more cargo to load. The Master of the vessel cites a draft restriction of 39 feet at Galveston as limiting the load and Charterers did not attempt to impeach his testimony or offer contradictory evidence. Charterers had no right to assume brackishness of water at Galveston to formulate their claim.

Owners point to Rule D of the York-Antwerp Rules contained in the charter (Clause 19) which provides that a party's participation in General Average "shall not prejudice any remedies which may be open against that party." Thus the General Aver-

age in which both Owners and cargo owners participated does not prejudice Owners' rights or for that matter cargo owners' rights against Charterers.

Decision:

Stranding 3-25-74

The circumstances leading up to the claims put forward in this proceeding are not in serious dispute. The question to be answered can be briefly stated to be, "Was the stranding of the vessel a simple error in navigation or was it the result of a breach of the safe port warranty by Charterers?". We have considered all that is before us and after carefully deliberating the issue we have concluded that the stranding was not caused by any error in navigation and we are of the opinion that Owners' arguments and citations of law in the area of the breach of safe port warranty should be followed. Charterers are responsible to Owners for all provable damages resulting from the stranding of March 25, 1974 and Charterers' counter claims fail.

We accept that,

> "A port will not be safe unless in the relevant period of time, the particular ship can reach it, use it, and return from it, without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship." (The Eastern City 1958 2 Lloyds Rep 127)".

Charterers selected from the loading port range a Mississippi River port. Thereafter they directed the Vessel to load the quantity of cargo she was to sail with. The stranding of March 25, 1974 was caused by a well known phenomenon of this river which was or should have been known to both parties but was not necessarily foreseeable on this voyage since the sailing draft was in accordance with the then existing recommendation of the

Pilot Authority. In our opinion the inability of this vessel to safely exit the Mississippi River at the time directed by Charterers was a breach of the safe port warranty, of the contract. Unlike the AQUA CHARM decision, pointed to by Charterers as a precedent in their favor, this contract was not for named ports, Charterers and Owners herein only agreeing to trade via Mississippi River and/or Galveston and other ports always within I.W.L. That the vessel was seaworthy upon sailing is without question. Charterers simply elected to load more cargo than the vessel would safely exist the river with.

In our opinion the definition to be applied here of a "safe port Mississippi River" must of necessity include the river that is the only means of approaching and/or departing from the Port. The river proved to be unsafe for this vessel at this time and Charterers suffered the resulting consequences. Charterers' counterclaims refer to expenses incurred in off-loading cargo after refloating because the authorities reduced the maximum departure draft. We must deny these because even if no stranding had occurred Charterers are liable for any lightening operation that might be dictated by an abrupt change in authorized draft after loading. Adjustments of the safe existing draft at Southwest Pass are made frequently and at times without warning. When it is elected to load the vessel near to or at the maximum permissible draft one always assumes a risk of being unable to transit the river and pass without delay or, as in this case, getting involved in lightering to permanently reduce the sailing draft. Whether it be practical or not it would seem that knowing the vessel is to complete loading at another port which doesn't possess the finicky characteristics of the Mississippi River a greater safety margin should be considered when programming the vessel's Mississippi port loading plan.

We find no merit in Charterers' petition that Owners cannot recover from them the same damages as they already recovered in General Average. We accept that Owners could not claim Cargo Owners' contribution to General Average from Char-

terers unless specifically instructed to do so by Cargo Owners. In the case before us the incident giving rise to the declaration of General Average was not caused by a breach of the Contract of Carriage with Cargo Owners and therefore they had no choice but to contribute in General Average. Owners rightfully excluded from their claim the recovery received from Cargo interests.

Charterers suggest that the "ULTRAMAR" arbitration decision should be followed in this case and we disagree. In that case there was no finding that the port and its approaches were unsafe when the vessel departed the berth. Rather it was the abnormal occurrence of the river being temporarily blocked by another vessel which prevented the ULTRAMAR exiting the river on schedule. Had the same set of circumstances involved the ROSS ISLE, Charterers herein, being Time Chartered Owners of the Vessel, would have been in the exact same position as the Owners of the ULTRAMAR found themselves.

Owners are entitled to recover their provable damages and having so ruled we find it unnecessary to deal with the question of the deletion of line 98 of the printed charter form from Clause 15A of the mimeographed clauses. Had we ruled otherwise we would have been inclined to follow the Charterers' submission in this area for to have followed the Owners' suggested interpretation would not recognize what we believe to be the true overall meaning of the two clauses when read together.

Off Hire March 15-16, 1974

The Panel unanimously rejects also Charterers' attempt to place the Vessel off hire retroactively 13½ hours before they got around to inspecting it for clean holds at 0930 hours March 16th. While they point to Clause 46 mentioning off hire from arrival if the holds were found unclean we believe this implied an obligation to inspect the holds immediately on arrival. When they did not do so, they were procrastinating at their own expense. If for a day or two Charterers' surveyor was not able

to attend the Vessel because of bad weather or simply because Charterers forgot to instruct a surveyor to inspect the Vessel at anchorage, how could fault be imputed to Owners for such delays? Their postponing of the inspection was an elective delay for their own account.

Short Loading

Charterers' claim for alleged short loading of 949 L.T. of grain at Galveston is denied. Charterers had at their disposal the full reach of the Vessel and it was their servants who loaded the cargo. Not only was hold No. 8 slack but so was hold No. 3. Charterers did not disprove the Master's position that a draft limitation for sailing from Galveston dictated the available deadweight of the Vessel nor have they produced evidence that a deficiency of the Vessel prevented loading this additional cargo. Charterers' claim is totally unsubstantiated.

Award:

Charterers are directed to pay Owners the sum of $1,194,-535.57 which sum we arrived at as follows:

1.	Improper hire deduction for period 2000 3/15/74 to 0930 3/16/74	$ 9,377.42
2.	Improper hire deduction for period 0430 3/25/74 to 1305 4/1/74	122,658.97
3.	Refloating expenses	160,911.01
4.	Owners' Superintendent's expenses refloating	2,190.81
5.	Classification fees New Orleans	1,040.00
6.	Detention loss for period 0630 6/22/74 to 1000 7/13/74	375,527.34
7.	Damage repairs and expenses claimed	325,423.92

8.	Owners' Superintendent Rotterdam, June/July 1974	3,693.66
9.	Classification damage survey Rotterdam	2,236.18
		$1,003,064.31
10.	Less Owners' allowance of amount received from cargo interests	132,755.88
	NET OWNERS' DAMAGE	$ 870,308.43
11.	Interest on $132,036.39 (Items 1 & 2 above) from April 1, 1974 to July 1, 1979 at 7½% per annum	51,989.34
12.	Interest on $738,272.04 from August 1, 1974 to July 1, 1979 at 7½% per annum	$ 272,237.80
	TOTAL AWARD	$1,194,535.57

We further rule that if the amount due is not paid in full within 30 days from the date of this Award, interest of 9% per annum shall commence to accrue on the principal sum awarded ($870,308.43) until payment in full has been received by Owners or until the date that this Award has been reduced to judgment by a court having jurisdiction in these premises whichever shall first occur.

Even though we are with ample authority to give consideration to the demands for an allowance of attorneys' fees and expenses we exercise our discretion in this area and make no allowance to either party. We rule that the cost of hearing transcript be mutually shared. Liability for full settlement of the Panel's fee and expenses is joint and several and in the event that either party fails to pay their share of this fee as provided for in Appendix B to this Award the remaining party shall promptly pay same and thereafter have right of recovery over

against the defaulting party. Both appendices are an integral part of this Award.

As agreed in the submission agreement, this Award may be made a judgment of the United States District Court for the Southern District of New York.

Lloyd C. Nelson
Mack G. Klosty
H. L. Cederholm, Chairman

Dated July 1, 1979
New York, New York

APPENDIX A

To Award Re S/S Ross Isle

The following portions of the Charter Party are referred to in the text of the Award:

Line 15:

"— — — always safe and afloat at loading and discharging berths within below mentioned trading limits."

Line 27:

"— — — in such lawful trades, between safe port and/or ports in — — —"

CLAUSE 15:

Line 97:

("That in the event of the loss of time from deficiency of (men or stores, fire, breakdown or damages to hull, ma-(chinery or equipment

Line 98:

(grounding, detention by average accidents to ship or (cargo, drydocking for the purpose of examination or paint-(ing bottom, or by any other cause

Line 99:

(preventing the full working of the vessel, the payment of (hire shall cease for the time thereby lost; and if upon the (voyage the speed be reduced by

defect in or breakdown of any part of her hull, machinery or equipment, the time so lost, and the cost of any extra fuel consumed in consequence thereof, and all extra expenses shall be deducted from the hire subject to Clause 15a."

Arbitration Award

CLAUSE 15a:

"With reference to Clause 15, it is agreed as follows: Referring to lines 97 and 99 (and also line 137 — Clause 21), the time lost for which hire shall cease (or be suspended) is to be; (i) from when the vessel puts back to a port or departs from or interrupts the voyage or is withdrawn from the service of Charterers for drydocking, repairs or other Owners' purposes, all other than the direction of Charterers or their Agents (as contemplated by line 35), until the vessel is again in the same position or at a point suitable to Charterers equivalent thereto. (ii) losses of time due to the delay to the vessel or interference with Charterers' use of the vessel by strikes or labour (union(s) or workers) manifestations or stopages in any form on account of the vessel's flag registry, ownership, manning or wages pattern or her previous trading.

CLAUSE 21 including line 137 deleted.

Line 138 following Clause 21:

"No drydocking except in case of emergency. Vessel last drydocked end January 1974."

CLAUSE 19:

"That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and Crew's proportion. General Average shall be adjusted, stated and settled, according to York-Antwerp Rules 1950 at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by these Rules according to the laws and usages at the Port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in for-

eign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposits as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall if required be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall be paid in United States money.

Provisions as to General Average in accordance with the above are to be included in all bills of lading issued hereunder."

Clause 26:

"Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The Owners to remain responsible for the navigation of the vessel acts of pilots and tugboats, insurance, crew, and all other matters, same as when trading for their own account."

Clause 46:

"Vessel to be clean for grain on arrival at first loading port and obtain necessary approval from the National Cargo Bureau and/or U.S. Department of Agriculture and/or local grain inspectors (Board of Trade. If vessel not accepted, to be off-hire until approval obtained."

Arbitration Award

APPENDIX B

To Award Re S/S Ross Isle

The Panel sets its total fee at $18,000.00 to be paid by Owners remitting $3,000.00 to each Arbitrator and by Charterers remitting to each Arbitrator $3,000.00. In addition each party shall pay to the Chairman administrative expenses of $200.00. These sums are the joint and several liability of both parties as provided in the main Award of which this Appendix B is an integral part.

Lloyd C. Nelson
Mack G. Klosty
H. L. Cederholm, Chairman

New York
July 1, 1979

United States Arbitration Act of 1925, Section 10

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Office-Supreme Court
FILED
APR 28 1981
ALEXANDER L. STEVAS
CLERK

No. 80-~~6052~~ 1652

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

In the Matter of the Arbitration

—between—

INTERNATIONAL PRODUCE, INC.

Petitioner,

—and—

A/S ROSSHAVET, Owners of the S.S. ROSS ISLE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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A/S ROSSHAVET, Owners of the S.S. ROSS ISLE,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, A/S Rosshavet ("Rosshavet"),* respectfully submits this brief in opposition to the petition of International Produce Inc. ("International") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

1. Are the standards set forth in 9 U.S.C. § 10 the sole grounds for vacating an arbitration award?

2. Did the Court of Appeals err in concluding under the unique facts of the present matter that there was no reasonable basis for concluding a challenged arbitrator displayed evident partiality for or against either party to the arbitration?

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* A/S Rosshavet is a publicly owned Norwegian corporation with two wholly owned subsidiaries, A/S Ross Rig and Ross Drilling Co. A/S.

STATEMENT OF THE CASE

The facts are succintly and accurately set forth in the Court of Appeals' opinion (2a-6a), but Rosshavet respectfully invites the Court's attention to certain highly significant facts which were stated inaccurately or omitted in International's "Statement of Facts".

International fails to state that at the first arbitration hearing on September 9, 1977, all three Arbitrators disclosed relationships with the parties and their counsel pursuant to the rules of the Society of Maritime Arbitrators, and the mandate of this Honorable Court in *Commonwealth Coatings Corp. v. Continental Casualty Corp.*, 393 U.S. 145 (1968). All three Arbitrators disclosed contacts with International or its parent corporation, while only one, the Third Arbitrator, Mr. Hammond L. Cederholm, disclosed a contact with Rosshavet's counsel. Cederholm stated that the firm of Haight, Gardner, Poor & Havens, ("Haight, Gardner") was handling a Protection and Indemnity ("P and I") Club matter for one of his employer's principals (3a). Neither party availed itself of the Panel's invitation to question the Arbitrators further, and both sides accepted the Panel with full knowledge of each Arbitrator's relevant contacts. If International had inquired further concerning the P and I matter, it would have learned it involved the vessel, MARY S (3a).

On December 6, 1977, an evidentiary hearing was held in the ROSS ISLE arbitration and Rosshavet presented its case through the testimony of witnesses who had traveled from Norway and Louisiana. Because of the illness of the Arbitrator appointed by Rosshavet, Rosshavet's witnesses were heard (and seen) only by the Arbitrator appointed by International and by the Third Arbitrator, Mr. Cederholm.

On December 8, 1977, another dispute involving the MARY S arose. International's petition fails to state that neither Mr. Cederholm nor his employer James W. Elwell Co. ("Elwell") had any financial interest in the MARY S, or her owner, World

Carrier Corporation, since Elwell was paid a fixed management fee regardless of the vessel's profitability (3a-4a).

International's petition intimates that Elwell and Mr. Cederholm made the decision to retain Haight, Gardner to represent the vessel's interests (Petition, p. 5). On the contrary though, the P and I Club's New York representative, Frank B. Hall & Co. ("Hall"), recommended that Haight, Gardner represent the vessel's interests in the second MARY S case (4a). Hall was acting on behalf of the P and I Club, Assuranceforeningen Gard, which had been represented in New York by Haight, Gardner since 1936. The manner in which the second MARY S matter was referred to Haight, Gardner was the same manner in which the first MARY S case had been referred.

International's petition states that after Mr. Carey became aware of his Firm's involvement in the second MARY S case, there followed "a rash of correspondence" (Petition, p. 5). In the course of that correspondence, the other two arbitrators, Messrs. Nelson and Klosty, urged Mr. Cederholm to remain on the Panel. Haight, Gardner's reason for urging Mr. Cederholm not to withdraw, recognized by the Court of Appeals (5a) but not mentioned in the petition herein, was that "if Cederholm withdrew there would be only one Arbitrator who had observed Rosshavet's witnesses", which would have prejudiced Rosshavet. Both Arbitrators stressed that the type of situation under consideration was unavoidable in the small interconnected maritime community of New York (8a-9a). Finally, after Rosshavet's counsel and the other two Arbitrators urged Mr. Cederholm to remain on the Panel, International's counsel wrote to Mr. Cederholm and expressed confidence that he could "continue to act judiciously and objectively without partiality or bias" (5a). Notwithstanding that expression of confidence, International's counsel formally requested that Mr. Cederholm withdraw.

REASONS FOR DENYING THE WRIT

1. The Decision Below is not in Conflict with any Decision of this Court or of any other Court.

The statutory grounds enumerated in 9 U.S.C. § 10 are the exclusive grounds for vacating an arbitration award, and the burden of proving the existence of such grounds rests with the party seeking vacation. *Bell Aerospace Co. Division of Textron, Inc. v. Local 516, Int'l Union of United Auto Aerospace and Agriculture Implement Workers of America*, 500 F.2d 921 (2d Cir. 1974); *Reed & Martin Inc. v. Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971); *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967); *Fukaya Trading Co., S.A. v. Eastern Maritime Corp.*, 322 F. Supp. 278 (E.D. La. 1971).

The Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, *supra*, did not expand the statutory grounds to include an "appearance of bias". *Commonwealth Coatings* involved the failure of an arbitrator to disclose that he had earned approximately $12,000 for consulting services rendered to a party to the arbitration. Some of those services were performed on projects involved in the arbitration.

The Court reversed the Court of Appeals and District Court's confirmation of the award on the ground the failure of disclosure of the financial relationship with a party to the arbitration constituted "evident partiality". 393 U.S. at 148. Justice Black concluded his plurality opinion with the statement that tribunals permitted by law to try cases and controversies must avoid even the "appearance of bias". 393 U.S. at 150. The core of Justice Black's opinion, though, was that failure of disclosure in some instances will constitute an irrebuttable presumption of "evident partiality". 393 U.S. at 148.

The Court's holding in *Commonwealth Coatings* becomes clear when the concurring opinion of Justices White and

Marshall is considered. While those Justices concurred with the plurality opinion, they noted:

> "The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges or indeed of any judges . . . it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party [to the arbitration], that fact must be disclosed." 393 U.S. at 151-152.

Two Justices therefore disassociated themselves from the sweeping dicta employed by Justice Black, including the phrase "appearance of bias", and restricted the scope of the Court's decision to situations where business and financial dealings with a party to an arbitration were not disclosed by an arbitrator.

Justice Fortas, joined by two other justices, dissented from Justice Black's opinion, maintaining that a failure to disclose constitutes a rebuttable presumption of "evident partiality", and that such a presumption was rebutted by the record before the Court. 393 U.S. at 154.

Rosshavet submits that a reading of all the opinions in the *Commonwealth Coatings* case reveals that the Supreme Court did not expand 9 U.S.C. § 10 to create a new criterion, "the appearance of bias", as a ground for vacating arbitration awards. Rather, the Court held that the arbitrator's failure to disclose business and fianancial dealings with a party to the arbitration resulted in a presumption of the existence of "evident partiality".

Subsequent decisions expressly rejected the contention that an "appearance of bias" is a ground for vacating an award. In *Standard Tankers (Bahamas) Company Limited v. Motor Tank Vessel AKTI*, 438 F. Supp. 153 (E.D.N.C. 1977), the Court held the arbitrator's relationship to the parties must be evaluated under the "evident partiality" standard.

Indeed, this Court's denial of certiorari in *Transmarine Seaways Corp. v. Marc Rich & Co., A.G.*, 480 F. Supp. 352 (S.D.N.Y. 1979), *aff'd without opinion*, 614 F.2d 1291 (2d Cir. 1979); *cert. denied*, 445 U.S. 930 (1980), mandates denial of the present writ. In *Transmarine Seaways*, the party seeking to vacate the award relied exclusively on the assertion that an arbitrator's continued presence on the Panel in the face of the party's challenge constituted "an appearance of bias". The District Court noted that the matter differed from *Commonwealth Coatings*, since there was no failure to disclose and no income producing relationship between the arbitrator and the party. 480 F. Supp at 357. The opinion then addressed the respondent's heavy reliance on the "appearance of bias" language from *Commonwealth Coatings*:

> "Because it professes to perceive in the circumstances of this case 'the appearance of bias', Rich contends that Nelson should have been disqualified without more. *But there is no authority in the cases for so subjective a standard*". 480 F. Supp. at 358 (emphasis added).

Since the respondent was unable to cite any other ground for challenge to the arbitrator, the Court concluded that there was no impropriety in his participation, precluding a challenge on that ground. 480 F. Supp. at 358.

As noted above, the Court of Appeals affirmed the District Court without opinion, and this Court denied the petition for a writ of certiorari. The petition similarly should be denied in the present matter, especially in light of International's counsel's expression of confidence in Mr. Cederholm's abilities and integrity (5a).

International also cites the decisions in *Sanko S.S. Co.* v. *Cook Industries Inc.*, 495 F.2d 1260 (2d Cir. 1973) and *United States Wrestling Federation* v. *Wrestling Division of the AAU, Inc.*, 605 F.2d 313 (7th Cir. 1979). Rosshavet submits that neither case is of relevance in the present matter. *Sanko S.S.*, unlike the present matter, was a non-disclosure case, involving

the failure of an arbitrator to disclose his extensive relationships with a party and its counsel. The Court did not discuss the statutory criteria for vacating awards when the adequacy of disclosure is not the issue. *United States Wrestling Federation*, similarly was a non-disclosure case where the Court's inquiry centered on whether an arbitrator's failure to disclose a connection with a member of an organization which was a party to the arbitration constituted "evident partiality". 605 F.2d at 318.*

In light of the above, there is no conflict between the Court of Appeals' decision in the present matter and any decision of this Court or any other Court of Appeals.

2. The Finding Below is Limited to its own Facts.

All of the Justices in *Commonwealth Coatings* acknowledged that arbitrators' ties to the market place are not merely unavoidable, but are necessary and desirable as the base of experience which uniquely qualifies arbitrators to resolve commercial disputes. That view is particularly applicable to the shrinking American shipping industry, where the community of businessmen and qualified arbitrators is small and substantial contacts among them are inevitable in a large proportion of cases.

In fact, the New York community of businessmen and admiralty lawyers engaged in the resolutions of charterparty

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* International relies on the unreported case of *Miserocchi & Co. S.P.A. v. Peavy International Inc.*, 78 Civ. 1571 (S.D.N.Y. Sept. 15, 1978) to support its position. In that case, an arbitrator disclosed that he had received commissions totaling $41,073.33 from one of the parties, but refused to withdraw when he was challenged at the outset of the arbitration. The District Court vacated the award. Clearly, a direct financial connection between a party and an arbitrator gives rise to an irrebuttable presumption of "evident partiality". However, that case does not stand for the proposition that if at any time in the course of an arbitration a party alleges an arbitrator's presence creates an "appearance of bias", the arbitrator must withdraw. *Transmarine Seaways Corp. v. Marc Rich and Co., A.G., supra.*

disputes may be likened to a small county seat in which the judges, lawyers and businessmen are all well acquainted with each other, the fact that they are acquainted constituting a form of discipline in itself.

Whether such ties are too remote to constitute bias or to create a presumption of evident partiality is a question of fact in each individual case. *Andros Cia. Nav. S.A. v. Marc Rich & Co. A.G.*, 579 F. 2d 691 at 701 (2d Cir. 1978); *Sanko S.S. Co. Ltd. v. Cook Industries Inc., supra* at 1264, n. 3. The present matter involves a unique set of facts and relationships, which is most unlikely to ever occur again.

Rosshavet submits the numerous factual distortions and embellishments which are contained in the petition were inserted in an attempt to obfuscate the fact Internanational's case is essentially a contention that a commercial arbitrator's appearance as a witness in an arbitration where members of two law firms are adversaries results in positive and negative biases being engendered toward attorneys. It is argued that those biases then are transferred to other members of those firms who are adversaries in another arbitration in which the commercial man is sitting as an arbitrator. Finally, those biases are said to be transferred to the attorneys' clients in the second arbitration, even though those clients had no connection to the other arbitration.

The Court of Appeals rejected that argument, accurately noting it does not follow that an arbitrator's personal feelings in favor of or against one attorney necessarily would be transferred to another attorney in the same firm and then to the second attorney's client (8a).

Courts have expressly held that a judge's alleged partiality or bias towards a party's attorney is insufficient to disqualify a judge from hearing and deciding a case. *United States v. International Business Machines*, 475 F. Supp. 1372 (S.D.N.Y. 1979); *United States v. Zagari*, 419 F. Supp. 494 (N.D. Cal. 1976). In *Davis v. Board of School Commissioners*, 517 F.2d 1044 (5th Cir. 1975); *cert. denied*, 425 U.S. 944 (1976), a party

sought disqualification of a judge on the grounds of bias, because in another action the presiding judge had become embroiled in a bitter conflict with the party's counsel. The Court refused to disqualify the judge noting:

> "They [the complaining party] seek disqualification on an imputation theory—the bias against their lawyer is imputed to them. Read broadly, this preemptory challenge type approach would bid fair to decimate the bench. Lawyers, once in controversy with a judge, would have a license under which the judge would serve at their will." 517 F.2d at 1050.

Even assuming International's imputation theory had some vitality, Rosshavet submits that commercial arbitration is not an event which generates bias or emnity, for in the words of the Court in *Pando Compania Naviera S.A. v. Filmo S.A.S.*, 1 Lloyd's List Law Reports, 560 (Queens Bench, 1975):

> "The shipping and commodity trades of the world are unusual in that they do not regard litigation or arbitration with abhorrence. *On the contrary, they regard it as a normal incident of commercial life—a civilized way of resolving the many differences of opinion which are bound to arise.* Would that the same intelligent attitude were adopted within industry." 1 Lloyd's List Law Reports at 562 (emphasis added).

The Court of Appeals considered the facts of the present matter and concluded as fact that Mr. Cederholm's contact with the two law firms in the ROSS ISLE arbitration could not result in his being biased against International, and/or in favor of Rosshavet. Indeed, the Court noted there was "no claim of animosity toward any counsel" and no evidence of anything remotely resembling evident partiality (8a). The present matter is not a disclosure case and is unique in the sense that International complains of a situation which was created by its counsel's decision to represent a party in another arbitration, after the ROSS ISLE arbitration had commenced and Ros-

shavet had presented its witnesses. Rosshavet respectfully submits that there is nothing which warrants this Honorable Court's review of the Court of Appeals' factual conclusion concerning that unique situation.

CONCLUSION

In light of the above, Rosshavet respectfully submits that the petition herein should be denied.

Dated: New York, New York
April 28, 1981

Respectfully submitted,

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